

STATE OF MICHIGAN
COURT OF APPEALS

DIANE SASU,

Plaintiff-Appellant,

v

VILLAGE PARK OF ROYAL OAK, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
November 8, 2011

No. 299676
Oakland Circuit Court
LC No. 2009-102534-NO

Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of defendant's motion for summary disposition.

Plaintiff's cause of action arises out of a fall that occurred in the parking lot of defendant's premises on March 23, 2008 at 10:00 a.m. Plaintiff resided at defendant's apartment complex. According to plaintiff, a storm occurred on March 22, 2008, which resulted in four to six inches of snow. At the time, plaintiff's car was parked outside and was uncovered. As a result, on the morning of March 23, plaintiff went outside to clean off her car. It had stopped snowing by the time she went outside. When plaintiff walked outside, she observed that both the sidewalk and the parking lot were clear of snow. In contrast, there were a minimum of four to six inches of snow on the grass. Plaintiff went to her car and retrieved her snow brush. She then cleaned off the passenger side of the car, working from the front to the back. As plaintiff was walking around the rear of the car, she slipped and fell. Plaintiff stated that a patch of ice caused her fall. She described the patch of ice as being two feet wide and two or three feet long. She stated that it looked like the ice was running out from beneath her car, that it was black and difficult to see in the shadow of the car and that there was snow on it. She further stated that she first saw the ice as she was stepping in it and that she was unable to stop.

Plaintiff filed her complaint on July 24, 2009. Plaintiff alleged that defendant was negligent in the maintenance of the parking lot, walk ways and gutters.¹ Plaintiff asserted that the negligence arose from breaches of statutory and common law duties. Plaintiff stated that as a result of that negligence, black ice accrued in the parking lot and was not timely removed. Plaintiff further alleged that the black ice caused her to fall and suffer several physical injuries as well as “severe shock, fright and mental anguish.” Defendant generally denied each of plaintiff’s allegations.

Defendant moved for summary disposition on June 15, 2010. Defendant asserted that summary disposition was appropriate pursuant to MCR 2.116(C)(10). Defendant argued a lack of duty due to open and obvious nature of the condition and the absence of a duty to keep a parking lot free from naturally occurring snow and ice and a lack of notice of the condition giving rise to the fall. On July 12, 2010, plaintiff filed her response to defendant’s motion for summary disposition. Plaintiff alleged that the ice that she fell on was able to form and accumulate due to defendant’s failure to fix the building’s leaky gutters. In support of this opinion, plaintiff cited to the affidavit of Paul Gross, whom she retained as an expert meteorologist. According to Gross, the area near the apartment received four inches of snow on March 22, 2008. During the early hours of March 23, the temperature rose above the freezing point. Gross opined that under those conditions, the snow on the roof would melt. Gross opined that if the gutter leaked the water from the gutter would form into black ice on the surface below. In reliance on that opinion, plaintiff argued that defendant was liable for her injuries because those injuries were not merely the result of defendant’s failure to clear the parking lot of ice, but were the result of defendant’s breach of its statutory duties to maintain its premises. Additionally, plaintiff asserted that the open and obvious doctrine was not applicable because the black ice was not discoverable on casual inspection.

The trial court held a hearing on the motion for summary disposition on July 28, 2010. At the close of the hearing, the court concluded that the icy condition was open and obvious. The court acknowledged that if plaintiff could demonstrate the existence of an applicable statutory duty, her claim could survive despite the open and obvious nature of the ice. The court noted that defendant had a duty to not allow the premises to fall into disrepair. However, the court concluded that the leak in the gutter did not rise to the level of disrepair. Earlier in the hearing, the court also noted that it did not believe plaintiff could demonstrate that the ice in the parking lot was the result of the leaking gutter. Therefore, the court held that plaintiff failed to establish an applicable statutory duty. As a result, the court held that defendant was entitled to summary disposition.

Plaintiff contends that the trial court erred in granting defendant’s motion for summary disposition. Plaintiff contends that the court erred in its finding that that the condition was open

¹ The complaint does not clearly state the alleged role of the gutters in plaintiff’s fall. However, as is demonstrated below, plaintiff’s theory was ultimately set forth in her response to defendant’s motion for summary disposition.

and obvious, that defendant did not have notice of the condition, and that there was no applicable statutory duty.

This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997).

While the issue is not outcome determinative, we will first address plaintiff's contention that the hazard was not open and obvious. In general, visible ice or snow constitutes an open and obvious hazard and the premises owner has no duty to warn of its existence. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479-481; 760 NW2d 287 (2008). In certain instances, this Court has recognized that the hazardous ice may constitute "black ice" and be invisible upon casual inspection. Unlike ice and snow, black ice is not an open and obvious hazard. *Id.* at 483.

In the present case, plaintiff contends that the ice that caused her fall was invisible upon casual inspection and did not have snow on it. Therefore, plaintiff argues that the hazard is properly characterized as black ice. Plaintiff's argument is not supported by the record. Plaintiff testified at her deposition that she saw the ice as she was stepping on it. She stated that after she fell, she also saw that there was snow on the ice. When viewing the evidence in the light most favorable to plaintiff, we must accept that plaintiff did not see the ice until it was too late to avoid the hazard. However, just because plaintiff did not see the ice until she could not avoid it does not mean that the ice was not visible upon casual inspection. At best, plaintiff's testimony demonstrates that plaintiff's failure to see the ice can be attributed to the fact that the ice was behind the vehicle and plaintiff came into contact with it immediately after walking from the side of the vehicle. There is no testimony that anything other than the angle of plaintiff's approach rendered the ice invisible, and the snow sitting on the surface of the ice was an indication that the underlying surface may be slippery. Plaintiff's very purpose in going outside was to remove snow from her vehicle. Under such conditions, the average Michigan resident would be cautious of encountering slippery conditions. Therefore, we conclude that hazardous condition was open and obvious.

While it is generally true that a plaintiff cannot recover for an injury that results from an encounter with an open and obvious hazard, statutory duties sometimes exist that impose a duty on the premises owner to warn of, or remove, icy conditions regardless of whether those conditions are open and obvious. *Benton v Dart Properties Inc*, 270 Mich App 437, 444; 715 NW2d 335 (2006). In the present instance, plaintiff cites a number of statutory provisions in an effort to demonstrate that defendant had a statutory duty to maintain its premises and not allow the premises to fall into a state of disrepair. Plaintiff alleges that defendant violated those statutory provisions when it failed to fix the leaky gutter. Plaintiff contends that the gutter, and not the natural accumulation of ice, caused her injuries. The trial court did not hold that defendant had no statutory duty to maintain its premises. Rather, the court held that the leaky gutter did not rise to the level of a statutory violation.

Plaintiff cites several statutory provisions. First, plaintiff asserts that MCL 554.139 is implicated, which provides:

In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

Plaintiff additionally cites two provisions of the Michigan Housing Law. MCL 125.536 provides

When the owner of a dwelling regulated by this act permits unsafe, unsanitary or unhealthful conditions to exist unabated in any portion of the dwelling, whether a portion designated for the exclusive use and occupation of residents or a part of the common areas, where such condition exists in violation of this act, any occupant, after notice to the owner and a failure thereafter to make the necessary corrections, shall have an action against the owner for such damages he has actually suffered as a consequence of the condition.

Similarly, MCL 125.471 states

Every dwelling and all the parts thereof including plumbing, heating, ventilating and electrical wiring shall be kept in good repair by the owner. The roof shall be so maintained as not to leak and the rain water shall be drained and conveyed therefrom through proper conduits into the sewerage system in accordance with plumbing regulations so as to avoid dampness in the walls and ceilings and insanitary conditions.

Defendant offers no response to plaintiff's argument that MCL 125.536 and 125.471 each apply to the facts of this case. However, defendant does argue that MCL 554.139 is inapplicable. Defendant's argument is premised on our Supreme Court's decision in *Allison v AEW Capital Management, LLP*, 481 Mich 419; 751 NW2d 8 (2008). In *Allison*, the plaintiff alleged that his landlord violated MCL 554.139 after the plaintiff fell on a snow-covered parking lot at his apartment complex. Our Supreme Court held that defendant did not breach its duties under MCL 554.139 because a parking lot is not considered to be a common area and, therefore, need not be kept in reasonable repair. The Court further held that snow and ice was not considered a defect and need not be removed pursuant to MCL 554.139.

The allegations in the present case are distinguishable from *Allison*. While the alleged defect in *Allison* was the snow-covered parking lot, the alleged defect in the present case is the leaky gutter. Defendant has offered no authority for the notion that it was not statutorily required to maintain its gutters. Likewise, the trial court did not hold that a premises owner is not required to maintain its gutters. Rather, the court relied on the decision in *O'Donnell v Garasic*,

259 Mich App 569; 676 NW2d 213 (2003). Based on its interpretation of *O'Donnell*, the court appears to have concluded that the plaintiff was required to show multiple defects at the premises in order to show that a statutory duty was violated. The trial court then concluded a solitary leaky gutter did not rise to the level of defects seen in *O'Donnell*. While it is true that there were multiple defects at issue in *O'Donnell*, that decision merely held that it was necessary to remand the matter to the lower court for further development of the record regarding the alleged statutory duties. *O'Donnell* does not stand for the proposition that MCL 554.139 is only implicated after a certain number of defects have been shown.

We conclude that plaintiff has adequately alleged that defendant, by failing to repair and maintain its leaky gutter, violated its statutory duties under MCL 554.139 and MCL 125.471. Therefore, although we agree with the trial court that the alleged hazard was open and obvious, we reverse and remand as a result of the existence of an applicable statutory duty. We note that the parties each make limited argument regarding the issues of notice and causation. However, we refrain from addressing those issues because they were not definitively ruled on by the trial court and they did not form the basis of the trial court's grant of summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens